

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DAIRY BARN STORES, INC.	:	DETERMINATION
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1983	:	
through August 31, 1986.	:	

Petitioner, Dairy Barn Stores, Inc., 544 Elwood Road, East Northport, New York 11731, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986 (File No. 804197).

A hearing was held before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on May 10, 1988 at 1:15 P.M., with all briefs to be submitted by August 24, 1988. Petitioner appeared by Lapatin, Lewis, Green & Kaplan, P.C. (Benjamin Lewis, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Irwin Levy, Esq., of counsel).

ISSUE

Whether the purchase and installation by a convenience store of a walk-in freezer unit, which is free standing and not attached to the land, constitutes a capital improvement to real property within the meaning of Tax Law § 1101(b)(9), so as to be exempt from the sales tax due on the receipts from the sale and installation of tangible personal property under Tax Law §§ 1105(c)(3) and 1115(a)(17).

FINDINGS OF FACT

1. Petitioner, Dairy Barn Stores, Inc., is the owner of approximately 60 small convenience stores located in Nassau and Suffolk counties. Each store sells ice cream, eggs and various grocery products. Located adjacent to each of the convenience stores is a free-standing outside freezer box.

2. The freezer in issue in this case is 8.6 feet in height and 10 by 12 feet in its horizontal dimensions. It is shipped in about 20 prefabricated pieces on a flat bed truck. It is made of galvanized steel and urethane insulation and contains freezing and condenser units. Once constructed, the freezer is set on a four-inch concrete foundation slab set in the ground. While the freezer apparently may be bolted to the slab, the one in issue here merely rests on the slab with no attachment. The freezer has a "mast" for the connection of electrical service. It is guaranteed for 10 years and has an expected life of approximately 20 years. The freezers' costs range from \$10,000.00 to \$12,000.00.

3. To be moved, the freezer would have to be cut apart and pieced together again. However, it would not retain its insulating capability and would be useless as a freezer.

4. Building permits are required for the installation of the freezers in the Town of Huntington and Village of Lindenhurst, Suffolk County. Site plans for construction of these freezers have been required for properties located in the Town of Islip, Suffolk County, and the Villages of New Hyde Park and Port Washington, Nassau County.

5. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued to petitioner on November 24, 1986 for the period June 1, 1983 through August 31, 1986 in the amount of \$6,065.26, plus interest of \$571.30, for a total amount due of \$6,636.56. The tax due was based on the cost of the purchase and installation of the freezer unit. A consent extending the period of limitation for the period June 1, 1983 through August 31, 1984 to December 20, 1986 had been signed on August 14, 1986.

CONCLUSIONS OF LAW

A. The purchase and installation of the freezer in issue must be found to be exempt from the sales tax on receipts from the sale and installation of tangible personal property under Tax Law §§ 1105(c)(3) and 1115(a)(17). Such purchase and installation constitutes as a capital improvement to "real property, property or land" and is thus exempt from such tax (Tax Law §§ 1105[c][3][iii]; 1115[a][17]). It can be observed first that the terms "real property, property or land" are defined in Real Property Tax Law § 102.12(b) to include:

"Buildings and other articles and structures, substructures and substructures created upon, under or above the land, or affixed thereto...."

Under this language, a storage cooler very similar to the one under consideration here has been ruled to be real property taxable under the Real Property Tax Law. The ruling states:

"There is no question in our minds but that the storage cooler structure would be considered real property for taxation purposes under the general principles of law applicable thereto....Namely, it has been annexed by the owner of the property (a structure of this size can be deemed 'annexed' by its own weight); it is adapted and perhaps is even essential to the restaurant use which will be made of the property, and these circumstances indicate an intent to install permanently, i.e., as long as the property is devoted to restaurant use.

However, since the cooler is owned by a 9-A corporation, the question remains whether this structure is exempt from taxation under the provisions of subdivision 12(f) of section 102 of the Real Property Tax Law as movable machinery and equipment belonging to a 9-A corporation.

* * *

The structure which you describe is, in our opinion, not 'machinery or equipment' but rather a building, and therefore is no more entitled to the exemption than would, say, a tool shed of the same size and construction. As such, it is not

exempt." (1 Opns Counsel SBEA No. 69.)

Most significantly, the term "capital improvement" is specifically defined in Tax Law § 1101(b)(9), and it is clear that the installation of the freezer in question meets the three requirements of that definition: (i) the freezer adds to the value of the real property; (ii) it becomes part of the real property for purposes of the real property tax (1 Opns Counsel SBEA No. 69) and in fact is permanently affixed to the real property to the extent that its removal would render it useless and, unless replaced, sharply decrease the value of the convenience store which it services; (iii) it was intended by the taxpayer to become a permanent installation on the real property. In particular, this has not only been petitioner's testimony but has been manifest in petitioner's compliance with local building requirements. In so ruling, I note the Advisory Opinion of the State Tax Commission dated October 2, 1986 issued at the request of this taxpayer which held these freezer units to be subject to sales tax. For the reasons given above, I reach the opposite conclusion.

B. The petition of Dairy Barn Stores, Inc. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 24, 1986 is cancelled.

DATED: Albany, New York
December 8, 1988

/s/ Nigel G.

Wright _____
ADMINISTRATIVE LAW JUDGE